IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. NOEL EVAN CALDELLIS, Appellant.	))))))))))	NO. 61316-2-I DIVISION ONE UNPUBLISHED OPINION FILED: July 20, 2009

Leach, J. — Noel Caldellis challenges his convictions of first degree murder and two counts of second degree assault. He argues that (1) his custodial statement was improperly admitted at trial because he made an equivocal request for counsel before giving the statement, (2) the trial court erred in failing to give his proposed "no duty to retreat" instruction, (3) the first degree murder by extreme indifference to human life statute, RCW 9A.32.030(1)(b), is unconstitutionally vague as applied to him, (4) he was denied equal protection because prosecutors had unfettered discretion to charge either manslaughter or first degree murder, (5) substantial evidence did not support his convictions, and (6) the prosecutor committed misconduct. We agree with Caldellis that the trial court erred in failing to give his proposed retreat

instruction as to the assault charges but disagree with his remaining contentions. We thus reverse the convictions for second degree assault but affirm the conviction for first degree murder by extreme indifference to human life.

I. Background

On September 2, 2006, Noel Caldellis attended a party in Lake City. Jason Kimura, who was at the same party, was in the midst of a feud with Cole Huppert, who was at a different party hosted by siblings Dustin and Amanda Black in Brier. Around midnight, Kimura and several others left the Lake City party to head to the Brier party, where Kimura planned to fight Huppert. They left in a caravan of three or four cars; Caldellis was a driver of one of these cars.

The group stopped at a gas station mini-mart, where some of them bought food, and then met up in a nearby grocery store parking lot to wait for directions to Huppert's location. One of the other caravan members, Hannan Khan, got into a heated argument with Caldellis's passenger, Miguel. Khan pulled a gun on Miguel, and Caldellis stepped in and took the gun away from Khan. Caldellis then tucked the gun into his pants.

About 10 minutes later, the caravan group left the parking lot and headed to the party in Brier. When they arrived, Kimura walked toward the house to pursue Huppert for the fight. However, 25 to 30 people rushed from the house, some yelling profanities and racial slurs. Several of them immediately began

fighting with some of the people who had just arrived in Kimura's caravan.

Some members of both the Brier group and Kimura's group were watching the others fight. One in Kimura's group who was not engaged in the fighting saw someone run up as if to attack Caldellis, who fended him off by punching him. Next, he saw Caldellis pull out the gun and fire two shots in the air and one shot horizontally. Several witnesses heard gunshots and then saw Caldellis holding the gun, with his arm extended. One witness, Meghan Lever, saw a young man near the driveway fall to the ground.

Caldellis and the rest of Kimura's group got into their cars and left. Lever and the other Brier party guests ran toward the house, pushing and shoving to get inside. After they were inside, they locked the windows and doors. Lever called police to report the gunfire. She stayed on the line until police arrived, briefly went outside to meet police, and then went immediately back into the house when instructed by police and dispatchers. While she was outside, she saw someone lying on the ground. She later found out this person was Jay Clements, who had died from gunshot wounds.

The State charged Caldellis with first degree and second degree murder for the death of Jay Clements and two counts of first degree assault for assaulting Meghan Lever and Kyle Defenbach. Caldellis was convicted of first degree murder and, as lesser included offenses of the first degree assault

charges, two counts of second degree assault. The jury found he committed these crimes while armed with a firearm.

II. Discussion

A. Right to Counsel

Caldellis argues that he was denied the right to counsel under the Fifth and Fourteenth Amendments to the United States Constitution because detectives continued to question him after he made an equivocal request for counsel during a post-arrest interview and his subsequent custodial statement was, therefore, improperly admitted at trial. The United States Supreme Court has held that an unequivocal request is required to invoke the right to counsel after that right has been waived.[1] Thus, because Caldellis waived his right to counsel and then made a request that was equivocal, his statement was properly admitted.

In a recorded statement, Caldellis indicated that he understood his rights, including that he was entitled to an attorney. He then indicated that he wished to make a voluntary statement to detectives. But as soon as one of the detectives began to ask him a question about the party, Caldellis interrupted to ask, "Wait, actually, just, would it help me to have a lawyer? I mean . . . ." The questioning officer interrupted him, saying, "Well, I mean we already talked. We talked in

[1] Davis v. United States, 512 U.S. 452, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994).

the back of the car or on the . . . on the trip up here and um, we went over pretty much everything." He told Caldellis, "[T]hat's something . . . you know I can't give you uh, advice on . . . on what to do. I mean I can't give you any legal advice. Uh, that's something you need to decide for yourself." An exchange proceeded between the detectives and Caldellis in which Caldellis continued to question aloud whether it would be advisable for him to have an attorney, including a comment about his previous experience with a DUI charge, in which he stated, "[I]f I had had a lawyer it would have been better I just think." But the detectives steered the conversation back to the subject of the night of the shooting, and Caldellis voluntarily made his statement. In his statement of additional grounds, Caldellis points out that detectives "overtalk and sidestep" the issue of his request and "tactically steered the conversation in another direction in an effort to manipulate . . . away from the issue of counsel." Although he was not entirely comfortable proceeding without counsel, Caldellis never expressly requested a lawyer.

In State v. Radcliffe,[2] our Supreme Court recently held that an equivocal request for counsel does not foreclose police questioning on matters other than clarifying the request. The court held that its earlier opinion, State v. Robtoy,[3] which held that the Fifth Amendment required police to clarify a suspect's

[2] 164 Wn.2d 900, 194 P.3d 250 (2008).
[3] 98 Wn.2d 30, 653 P.2d 284 (1982).

equivocal request for counsel, was abrogated by the United States Supreme Court in Davis v. United States.[4] Davis held that once a defendant has waived the right to counsel, a later request for counsel must be explicit.[5] An equivocal request for counsel does not require police to stop the interrogation under the Fifth Amendment.[6] Therefore, because Caldellis did not make an unequivocal request, his statement was properly admitted at trial.

B. No Duty to Retreat Jury Instruction

Caldellis argues that the trial court erred because, although it instructed the jury on self-defense regarding the assault charges, it failed to instruct the jury that he had no duty to retreat.

Where the trial court's refusal to give a requested jury instruction is based on a ruling of law, we review the refusal to give the instruction de novo.[7] A refusal to give an instruction based on factual reasons is reviewed for an abuse of discretion.[8] Taken as a whole, jury instructions must properly instruct the jury on the applicable law, not be misleading, and allow each party to argue their theory of the case.[9]

"A defendant is entitled to a 'no duty to retreat' instruction when the

[4] 512 U.S. 452, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994).
[5] Radcliffe, 164 Wn.2d at 906 (citing Davis, 512 U.S. 452).
[6] Radcliffe, 164 Wn.2d at 906.
[7] State v. White, 137 Wn. App. 227, 230, 152 P.3d 364 (2007) (citing State v. Walker, 136 Wn.2d 767, 772, 966 P.2d 883 (1998)).
[8] White, 137 Wn. App. at 230.
[9] State v. Redmond, 150 Wn.2d 489, 493, 78 P.3d 1001 (2003).

evidence shows that the defendant was assaulted in a place where he or she had a right to be."[10]

> [T]he no duty to retreat instruction is required where . . . a jury may objectively conclude that flight is a reasonably effective alternative to the use of force in self-defense. The trial court cannot allow the defendant to put forth a theory of self-defense, yet refuse to provide corresponding jury instructions that are supported by evidence in the case.[11]

The instruction is not required, however, if it is unnecessary to the defendant's case theory or would be superfluous because the issue of retreat was not raised or the facts show that the defendant was in retreat.[12] It is also not required where the evidence does not suggest that retreat was a reasonable alternative to the use of force, for example, where the victim was holding the defendant at gunpoint at the time the defendant shot the victim.[13]

Here, Caldellis objected to the trial court's failure to give a "no duty to retreat" instruction, arguing that the issue of retreat was raised during the detective's interview of him, which was admitted as a voluntary custodial statement. The State used that evidence against Caldellis during its closing argument, inviting the jury to conclude that Caldellis could have retreated instead of firing the gun.

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[10] State v. Wooten, 87 Wn. App. 821, 825, 945 P.2d 1144 (1997).

[11] Redmond, 150 W.2d at 495.

[12] Wooten, 87 Wn. App. at 825 (citing State v. Frazier, 55 Wn. App. 204, 207-09, 777 P.2d 27 (1989)).

[13] Redmond, 150 Wn.2d at 493-94.

The State argues that Caldellis was not entitled to the instruction because he was not entitled to a self-defense instruction. However, the State did not object to the self-defense instruction at trial. In Redmond, the trial court had noted the case "barely" merited a self-defense instruction.[14] Nonetheless, because the trial court gave the self-defense instruction and the jury could have concluded that retreat was a reasonable alternative, our Supreme Court held that the retreat instruction was required.[15]

The State also argues that Caldellis was not entitled to the instruction because he was not in a place where he was lawfully entitled to be. However, it was undisputed that Caldellis was standing in a public street when the crime occurred. The State argues that Caldellis was not lawfully entitled to be in the street because he was there for an unlawful purpose, rioting. But Caldellis's purpose for being in the street is separate from the question of whether the public street is a place where Caldellis had a right to be. Furthermore, the trial court did not make a finding that Caldellis was not in a place where he was lawfully entitled to be. The trial court found that the present case was distinct from State v. Allery[16] because there, the defendant and the victim were in their own home with the door locked when the crime occurred, and there was a history of domestic violence by the victim against Allery. However, Washington

[14] Redmond, 150 W.2d at 495.
[15] Redmond, 150 W.2d at 495.
[16] 101 Wn.2d 591, 598, 682 P.2d 312 (1984).

courts have not limited the doctrine of no duty to retreat to situations that take place inside the defendant's home.[17] Therefore, the State was required to show that Caldellis was not in a place he had a right to be when the crime occurred, which it failed to do.

Under Redmond, the retreat instruction was required as to the assault charges because Caldellis was in a place where he had a right to be, the trial court instructed the jury on self-defense, and the jury could have concluded that flight was a reasonably effective alternative to his conduct. Therefore, we reverse the second degree assault convictions.[18]

Caldellis also asks that we reverse his first degree murder conviction on this basis. However, the doctrine of retreat applies only to self-defense. The jury was instructed on self-defense only in regard to the assault charges. Therefore, he was not entitled to a retreat instruction regarding the homicide charge.

C. Unconstitutionally Vague

Caldellis argues that RCW 9A.32.030(1)(b) is unconstitutionally vague as applied to him because it lacked sufficient standards for a jury to distinguish between extreme indifference and recklessness.

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[17] See Redmond, 150 Wn.2d 489; State v. Williams, 81 Wn. App. 738, 916 P.2d 445 (1996).

[18] Because we reverse the assault convictions on this basis, we do not address Caldellis's arguments that they were not supported by sufficient evidence or that they must be reversed due to prosecutorial misconduct.

"A statute is presumed to be constitutional, and the party challenging its constitutionality bears the burden of proving its unconstitutionality beyond a reasonable doubt."[19] A statute is void for vagueness if it either (1) does not define the offense with sufficient definiteness that ordinary people can understand what conduct is proscribed or (2) does not provide ascertainable standards of guilt to protect against arbitrary enforcement.[20] The requirement that the legislature establish minimal guidelines to govern law enforcement is the more important of the two requirements.[21] These guidelines are essential to prevent arbitrary enforcement by police, prosecutors, and juries.[22] "The fact that some terms in a statute are not defined does not mean the enactment is unconstitutionally vague."[23] Rather, "[a] statute is void for vagueness if it is framed in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its applicability."[24]

Caldellis was convicted under RCW 9A.32.030(1)(b), which provides,

> (1) A person is guilty of murder in the first degree when:
> . . . .
> (b) Under circumstances manifesting an extreme indifference to human life, he or she engages in conduct which creates a grave

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[19] State v. Thorne, 129 Wn.2d 736, 769-70, 921 P.2d 514 (1996).
[20] State v. Williams, 144 Wn.2d 197, 203, 26 P.3d 890 (2001).
[21] Kolender v. Lawson, 461 U.S. 352, 357-58, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983) (quoting Smith v. Goguen, 415 U.S. 566, 574, 94 S. Ct. 1242, 39 L. Ed. 2d 605 (1974)).
[22] Kolender, 461 U.S. at 358 (quoting Smith, 415 U.S. at 575).
[23] State v. Lee, 135 Wn.2d 369, 393, 957 P.2d 741 (1998).
[24] Lee, 135 Wn.2d at 393.

> risk of death to any person, and thereby causes the death of a person.

The jury was instructed that "[c]onduct which creates a grave risk of death under circumstances manifesting an extreme indifference to human life means an aggravated recklessness which creates a very high degree of risk greater than that involved in recklessness."

The court also instructed the jury regarding the lesser crimes of manslaughter in the first degree and manslaughter in the second degree. A person is guilty of manslaughter in the first degree when he "recklessly causes the death of another person."[25] The court instructed the jury that "[a] person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and the disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation."

Caldellis argues that the definition of "extreme indifference," which uses the phrase "aggravated recklessness," was not sufficient to distinguish "extreme indifference" from "recklessness," and thus the jury could not distinguish between the elements of the charged crime, first degree murder, and the lesser included offense, first degree manslaughter. He argues that "extreme indifference" is inherently subjective and does not prevent arbitrary enforcement

[25] RCW 9A.32.060(1)(a).

by the jury.

In State v. Dunbar,[26] our Supreme Court held that first degree murder by creation of a grave risk of death is not synonymous with first degree manslaughter. While manslaughter requires only an unreasonable risk, murder requires a very high degree of risk, which "elevates the level of recklessness to an extreme level, thus 'manifesting an extreme indifference to human life.'"[27]

Citing Dunbar, Division Two of this court held that RCW 9A.32.030(1)(b) was not void for vagueness in State v. Pastrana.[28] There, the defendant argued that the meaning of the phrases "grave risk of death" and "extreme indifference to human life" were so vague that he could not have known that firing a gun from a moving vehicle at another moving vehicle on a crowded freeway off-ramp could result in his conviction.[29] The court held, "[b]y any objective analysis, Pastrana should have known that shooting a gun at an occupied vehicle moving on a crowded freeway off-ramp created a grave risk of death and manifested an extreme indifference to human life."[30]

Caldellis does not argue that he did not have notice of the proscribed conduct but rather that the statute was not sufficiently definite to prevent arbitrary enforcement by the jury. "[A] statute fails to provide ascertainable

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[26] 117 Wn.2d 587, 817 P.2d 1360 (1991).
[27] Dunbar, 117 Wn.2d at 594 (quoting RCW 9A.32.030(1)(b)).
[28] 94 Wn. App. 463, 972 P.2d 557 (1999).
[29] Pastrana, 94 Wn. App. 473.
[30] Pastrana, 94 Wn. App. 476.

standards of guilt if it proscribes conduct by resort to inherently subjective terms or invites an inordinate amount of law enforcement discretion."[31] Caldellis argues that because the boundary between "extreme indifference" and "recklessness" is "not exact,"[32] the statute is unconstitutionally vague. However, because "some measure of vagueness is inherent in the use of language. . . . impossible standards of specificity are not required."[33] In addition, "the terms of the statute are not viewed in a vacuum; rather, the question is whether the terms are inherently subjective in the context in which they are used."[34] And when a statute does not define terms alleged to be unconstitutionally vague, "the reviewing court may 'look to existing law, ordinary usage, and the general purpose of the statute' to determine whether 'the statute meets constitutional requirements of clarity.'"[35]

Conduct that "creates a grave risk of death under circumstances manifesting an extreme indifference to human life" is objectively distinct from conduct that is "reckless." Recklessness requires that the defendant disregard a known substantial risk, whereas extreme indifference requires that the

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[31] Pastrana, 94 Wn. App. at 474 (citing State v. Coria, 120 Wn.2d 156, 164, 839 P.2d 890 (1992); State v. Worrell, 111 Wn.2d 537, 542, 761 P.2d 56 (1988)).

[32] Dunbar, 117 Wn.2d at 594.

[33] City of Seattle v. Abercrombie, 85 Wn. App. 393, 399, 945 P.2d 1132 (1997) (citations omitted).

[34] Pastrana, 94 Wn. App. at 474 (citing Worrell, 111 Wn.2d at 542).

[35] State v. Hunt, 75 Wn. App. 795, 801, 880 P.2d 96 (1994) (quoting State v. Russell, 69 Wn. App. 237, 245, 848 P.2d 743 (1993)).

defendant's conduct create a grave risk. There is thus a distinction on at least two levels. First, the jury must determine whether the conduct manifested a knowing disregard of a risk or actually created a risk. Second, the jury must distinguish between "substantial" and "grave" risk. The relevant definition for "grave" is "involving or resulting in serious consequences : likely to produce real harm or damage" or "very serious : dangerous to life."[36] "Substantial" has a number of definitions, but none are synonymous with "grave." For example, "substantial" can mean "not seeming or imaginary : not illusive" or "having a solid or firm foundation : soundly based : carrying weight."[37] Objectively, "grave" connotes a more serious risk than one that is merely "substantial."

The instructions provided meaningful guidance for the jury to determine whether Caldellis's conduct—shooting a gun toward a crowd of people—created "a grave risk of death under circumstances manifesting an extreme indifference to human life" or was merely "reckless." We hold that RCW 9A.32.030(1)(b) is not unconstitutionally vague as applied to Caldellis.

D. Equal Protection

Caldellis argues that he was denied equal protection because the law allows prosecutors to charge either first degree murder or first degree manslaughter for the same acts. However, "there is no equal protection violation

[36] Webster's Third New International Dictionary 992 (1993).
[37] Webster's Third New International Dictionary 2280 (1993).

when the crimes that the prosecuting attorney has the discretion to charge require proof of different elements."[38] While prosecutors are given broad discretion in determining what charges to bring and when to file them, this does not provide them with the power to predetermine that the sanctions sought will ultimately be imposed.[39] The fact that prosecutors may be influenced by the penalties available upon conviction does not give rise to a violation of the equal protection clause.[40]

The first degree murder by extreme indifference statute and the first degree manslaughter statute require proof of different elements. As discussed above, the murder statute requires "extreme indifference to human life" while manslaughter requires "recklessness." Because of the very high degree of risk involved, "extreme indifference" is distinct from "recklessness," which requires only the disregard of a "substantial risk." The prosecutorial discretion to file murder or manslaughter charges did not violate Caldellis's right to equal protection of the laws.

E. Sufficiency of the Evidence

A challenge to the sufficiency of the evidence admits the truth of the State's evidence and all inferences that can reasonably be drawn therefrom.[41]

[38] State v. Leech, 114 Wn.2d 700, 711, 790 P.2d 160 (1990).

[39] City of Kennewick v. Fountain, 116 Wn.2d 189, 194, 802 P.2d 1371 (1991).

[40] Fountain, 116 Wn.2d at 193 (citing United States v. Batchelder, 442 U.S. 114, 125, 99 S. Ct. 2198, 60 L. Ed. 2d 755 (1979)).

Evidence is sufficient to support a jury verdict if, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[42]

Caldellis argues that the evidence was insufficient to support his conviction for first degree murder by extreme indifference to human life. He argues that it is impossible that he could have had the specific intent necessary to support the second degree assault convictions and also have been acting with extreme indifference to human life. However, the evidence showed that Caldellis fired two shots in the air and then fired at least one shot horizontally in an area crowded with people. It was reasonable for the jury to conclude that he acted, with unlawful force, to create an apprehension of bodily injury in another and also that he acted with extreme indifference to human life. Although Caldellis did not intend to kill anyone, his conduct created a grave risk to human life and resulted in the death of another. The evidence was sufficient to support the conviction for first degree murder by extreme indifference to human life.

III. Conclusion

The trial court erred in failing to instruct the jury that Caldellis had no duty to retreat regarding the assault charges. We thus reverse the two convictions for assault in the second degree. The conviction for murder in the first degree is

[41] State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).
[42] State v. Thomas, 150 Wn.2d 821, 874, 83 P.3d 970 (2004).

affirmed.

Reversed in part, affirmed in part, and remanded for further proceedings consistent with this opinion.

WE CONCUR: